IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.1306 OF 2006

Abdul Rasheed Sikandarsab Kulkarni
& Ors. : Petitioners
(Orig.Accused Nos.49, 53, 61, 44 and 46)

V/s.

The State of Maharashtra & Anr. : Respondents

....

Mr.A.H.Solkar for the petitioners.

Mrs.A.S.Pai, Addl. Public Prosecutor for the State.

Mr.Raja Thakare, Special Public Prosecutor for C.B.I.

....

WITH

CRIMINAL WRIT PETITION NO.1308 OF 2006

Dattatraya Krishnaji Ghule : Petitioner
(Orig.Accused No.6)

V/s.

The State of Maharashtra & Ors. : Respondents

...

Mr.S.V.Kotwal for the petitioner.

Mrs.S.D. Shine, Addl. Public Prosecutor for the State.

Mr.P.D. Gharat, Special Public Prosecutor for C.B.I.

...

CRIMINAL WRIT PETITION NO.1320 OF 2006

Anil Murlidhar Deshmukh : Petitioner
(Orig.Accused No.6)

V/s.

The State of Maharashtra & Ors. : Respondents

...

Mr.S.V.Kotwal for the petitioner.

Mrs.A.S.Pai, Addl. Public Prosecutor for the State.

Mr.P.D.Gharat, Special Public Prosecutor for C.B.I.

...

CRIMINAL WRIT PETITION NO.1321 OF 2006

Ramesh Madhavrao Pawar : Petitioner
(Orig.Accused No.7)

V/s.

The State of Maharashtra & Ors. : Respondents

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Mr.S.V.Kotwal for the petitioner.

Mrs.A.S.Pai, Addl. Public Prosecutor for the State.

Mr.P.D.Gharat, Special Public Prosecutor for C.B.I.

....

AND

CRIMINAL WRIT PETITION NO.1356 OF 2006

Hitendra @ Nitin Manohar Vichare : Petitioner

V/s.

The State of Maharashtra & Ors. : Respondents

...

Mr.N.G.Bane for the petitioner.

Mr.V.B.Konde-Deshmukh, Addl. Public Prosecutor for the State.

Mr.P.D.Gharat, Special Public Prosecutor for C.B.I.

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CORAM : D.G.DESHPANDE & S.A.BOBDE,JJ.

DATE : JULY 6, 2006.

JUDGEMENT (Per S.A.Bobde,J.)

1. As these petitions give rise to common questions of law and facts, they were heard together and are being disposed of by this common judgement.

2. The petitioners in all these Writ Petitions are accused in various special cases. The petitioners are charged with various offences punishable under the Indian Penal Code and the Prevention of Corruption Act. Since they are also charged with having committed offences under the Maharashtra Control of Organised Crime Act, 1999, hereinafter referred to as the "MCOCA", their cases are being tried by a Special Court constituted under the MCOCA at Pune. The petitioners in Writ Petition No.1306 of 2006 have been arrested sometime in 2003 and have been remanded to judicial custody on different dates in the latter part of 2003. The petitioners in Writ Petition Nos.1308 of

2006, 1320 of 2006, 1321 of 2006 and 1356 of 2006 have been arrested on 8.10.2004 and all of them have been remanded to judicial custody by the Special Court on 8.6.2006. The period of remand of some of the petitioners expired on 29.6.2006 and of others expired on 1.7.2006.

3. The legality and validity of the remand order dated 8.6.2006 made by Judge S.P.Hayatnagarkar is challenged by them. The challenge is on the ground that the said Judge is not validly appointed under the provisions of the MCOCA for the Special Court. According to the petitioners, the said Judge was appointed, or conferred with power under section 5(5) of the MCOCA by an Office Order No.JO/30/2006 dated 6.6.2O06 by Special Judge Shri P.B.Joshi since Shri Joshi and the Addl. Special Judge Shri B.M.Deshpande were on leave on 8.6.2006. It is common ground that the said Judge Shri S.P. Hayatnagarkar was appointed to deal with the special cases under the MCOCA on 8.6.2006 because the regularly appointed Judge of the Special Court under the MCOCA was not available and he had been authorised by the Principal Judge to transact urgent business under section 5(5) of the MCOCA. There is no dispute that Shri Hayatnagarkar is an Addl. District and Sessions Judge and, therefore, otherwise qualified to be appointed as a Judge of the Special Court under section 5(4) of the MCOCA.

4. The petitioners contend that a Judge can be appointed to act as a Judge of the Special Court constituted for trial of offences under the MCOCA only by the State Government in consultation with the Chief Justice of this Court and there is no provision in the MCOCA by which the transaction of business can be distributed to, or directed to be dealt with by a Judge who is not an Addl. Sessions Judge specially appointed under the MCOCA. According to the respondents, the then Special Judge has the power to distribute urgent business in the event of his absence or in the absence of any Addl. Sessions Judge to any Judge who is qualified to be appointed as a Judge of the Special Court by virtue of section 5(5) of the MCOCA.

5. The offences under the MCOCA are triable by a Special Court constituted by the State Government by a Notification in the Official Gazette for a specified area under section 5. Such a Court is presided over by a Judge appointed by the State Government with the concurrence of the Chief Justice of the Bombay High Court. In the same way, the Government may appoint Addl. Sessions Judges to exercise the jurisdiction of the Special Court. The Special Court at Pune has two Judges, viz., the Principal Special Judge i.e. Shri P.B.Joshi and Shri B.M. Deshpande. Since they were to be on earned leave on

8.6.2006, the Special Judge Shri P.B.Joshi in purported exercise of powers under section 5(5) of the MCOCA handed over the charge of the Special Court to the IIIrd Addl. District & Sessions Judge Shri Hayatnagarkar before whom all the petitioners in these Writ Petitions were produced on 8.6.2006. The learned Judge, believing himself to be possessed with lawful authority, remanded all the petitioners to judicial custody for different periods. It is this remand order which, according to the petitioners, is unlawful which is under challenge. Therefore, the petitioners have prayed for a writ of habeas corpus for their release.

6. Since the dispute centres around the authority of the Judge who passed the order of remand, it is necessary to set out the provisions of the MCOCA. Section 5 of the MCOCA reads as follows:-

> "**5. Special Courts**.--(1) The State Government may, by notification in the Official Gazette, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.
>
> (2) Where any question arises as to the

jurisdiction or any Special Court, it shall be referred to the State Government whose decision shall be final.

(3) A Special Court shall be presided over by a judge to be appointed by the State Government, with the concurrence of the Chief Justice of the Bombay High Court. The State Government may also appoint, with the concurrence of the Chief Justice of the Bombay High Court, additional Judges to exercise jurisdiction in a Special Court.

(4) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court, unless he immediately before such appointment, is a sessions judge or an additional sessions judge.

(5) Where any additional judge is or additional judges are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order in writing, provide for the distribution of the business of the Special

Court among himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judges."

Section 6 of the MCOCA reads as follows:-

"**6. Jurisdiction of Special Court**.-- Notwithstanding anything contained in the Code, every offence punishable under this Act shall be triable only by the Special Court within whose local jurisdiction it was committed, or as the case may be, by the Special Court constituted for trying such offence under sub-section (1) of section 5."

7. On a plain reading of section 5, it is clear that the intention of the Legislature is to set up a Special Court by a Notification under section 5(1) to be presided over by a Judge who is to be appointed by the State Government in consultation with the Chief Justice of this Court under section 5(3) for that Court. Section 5(3) also contemplates the appointment of an Addl. Special Judge(s). It is also obvious that the appointment of a Special Judge can be made only from the category of

Sessions Judge or an Addl. Sessions Judge, vide section 5(4).

8. Admittedly, the Judge who passed the remand order on 8.6.2006, though a Sessions Judge, had not been appointed as an Addl. Special Judge under section 5(3) of the MCOCA. It is, however, contended by the learned counsel for the respondents that he was competent to act as an Addl. Special Judge under the MCOCA in pursuance of the powers conferred upon him by the District Judge under section 5(5). That sub-section (5) is quoted above.

9. Having considered the provisions, we are of view that the provision does not confer any power on the Judge of the Special Court to further confer the power to act as a Special Judge on any Sessions Judge. A Judge or an Addl. Judge for the Special Court under the MCOCA can only be appointed by the State Government in consultation with the Chief Justice under section 5(3). Sub-section (5) of section 5 allows the distribution of business of the Special Court between the Judges of the Special Court and the Addl. Judges. There is a provision for distribution of urgent business in the absence of the Judge of the Special Court. There is, however, nothing in that provision which suggests that the distribution of

business may be amongst Judges who are not appointed as Judges for the Special Court under section 5(3), as argued by the learned counsel for the respondents. In other words, the powers of a Special Court may not be conferred on any Judge unless he has been appointed as a Special or Addl. Special Judge in accordance with section 5(3) by the State Government in consultation with the Chief Justice of this Court. Any construction to the contrary would run counter to the scheme of the setting up and conferral of the jurisdiction of the Special Court under the provisions of the MCOCA.

10. It is, therefore, clear that the Judge who passed the remand order had no power to pass such an order. The remand order could only have been passed by a Special Judge who alone is empowered to exercise jurisdiction in these matters by virtue of section 6.

11. The question that remains to be decided is whether the petitioners can be said to have been illegally detained in unlawful custody and, therefore, whether they are entitled to be released on bail or otherwise.

12. There is no doubt that at first blush, it appears that an order remanding an accused to judicial custody passed by a Judge who had no authority to do so must be

treated as void and, therefore, the custody of the petitioners must be treated as unlawful. The learned counsel for the petitioners relied on the decision of the Supreme Court in State of Tamilnadu v. Parmasiv Pandian reported in A.I.R. 2001 S.C. 2972. That was a case where the Supreme Court upheld the order of the High Court holding that the Special Court constituted for trial of cases under the Act which had the exclusive power to pass an order of remand could not do so since the Essential Commodities (Special Provisions) Act under which the Special Court was established had lapsed. Therefore, the remand order passed by the Special Court at Madurai long after it had ceased to exercise the jurisdiction in cases under the Essential Commodities Act was invalid. That was a case where the Court itself had lost jurisdiction.

13. The present case, however, is one case in which there is no dispute about the jurisdiction of the Special Court. The dispute is about the powers of the concerned Judge to pass the order of remand. In passing the order of remand, the Judge acted within the scope of the authority conferred on him by the Principal Civil Judge and that the exercise of power was in public interest or third person and not for his own benefit. The question about the validity of the orders made by the officers

acting within the scope of their assumed authority fell for consideration of the Supreme Court in Gokaraju Rangaraju v. State of Andhra Pradesh, reported in (1981) 3 SCC 132, where a collateral attack was made on the validity of the judgement passed by a Judge whose appointment was held contrary to Article 233 of the Constitution of India. The Supreme Court repelled the contention and held that the attack was liable to be repelled in view of the de facto doctrine, which is a doctrine of necessity and public policy. Reviewing the law on the subject from the case of Pulin Behari v. King-Emperor, reported in (1912) 15 Cal.LJ 517, and after taking into account the cases on the point, the Supreme Court held that the judgements and orders of the Judge appointed as a Court of Sessions would be those of the Court of Sessions, notwithstanding that his appointment in such Court might be declared invalid. We are of view that the true principle in the matter of appointments declared invalid would a fortiori apply where powers are temporarily conferred on a Judge.

14. In Gokaraju Rangaraju's case (supra), the Supreme Court referred to the following passage from Cooley's Constitutional Limitations, Eighth Edition, Volume 2, p. 1355, which applies to the present situation:-

"An officer de facto is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His colour of right may come from an election or appointment made by some officer or body having colourable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed or made in favour of a party not having the legal qualifications; or it may come from public acquiescence in the qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who

attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognise or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is supposed to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. There is an important principle,

> which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally."

15. Gokaraju Rangaraju's case was followed by the Supreme Court in Pushpadevi M. Jatia v. M.L. Wadhawan, reported in (1987) 3 SCC 367 where one of the questions that fell for consideration was the competence of an officer who was appointed on an ad hoc basis to record statements under section 40(1) of the Foreign Exchange Regulation Act, 1973. The Supreme Court observed in para 21 as under:-

> "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. The official acts of such persons are recognised as valid under the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief."

16. The learned counsel for the petitioners then relied on the judgement of the Supreme Court in Central Bank of

India v. C. Bernard, reported in (1991) 1 SCC 319. What fell for consideration in that case was the competence of a disciplinary authority who held that position by virtue of being an officer of the Bank, to impose a punishment after his retirement. Their Lordships held that after retirement, the officer ceased to hold the office of the disciplinary authority and was incompetent to pass the order of punishment. In that context, Their Lordships rejected the applicability of the de facto doctrine since the person in question did not possess the office in question, having retired, and, therefore, had no authority to perform the duties attached to that office. There was no colour or title, that is, apparent right to the office (vide para 5 of the report at page 325). Clearly, the case before us is not covered by the aforesaid decisions, since the Judge who passed the remand order in question undoubtedly held the office of the Addl. Sessions Judge and was conferred with the powers of the Special Court by virtue thereof, although as a result of a mistake in law. We are, therefore, of view that though the order of remand passed by Shri Hayatnagarkar dated 8.6.2006 is passed by a Judge who was not legally vested with the powers to do so, nevertheless, in view of the decision in Gokaraju Rangaraju's case, the order of remand passed by him is not void in law and must be given effect to.

17. In the result, the petitions are dismissed. The rule is discharged.

Sd/-

D.G. DESHPANDE, J.

Sd/-

S.A. BOBDE, J.